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No. 10-222

Supreme Court, U.S.
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IN THE
Supreme Court of the United States

WYETH LLC, *et al.*,

Petitioners,

v.

SANDRA KIRKLAND, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF AMICUS CURIAE PHARMACEUTICAL RESEARCH AND MANUFACTURERS OF AMERICA IN SUPPORT OF PETITIONERS

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SEPTEMBER 2010 *Counsel for Amicus Curiae*

QUESTION PRESENTED

Whether, under the doctrine of fraudulent misjoinder, a federal court should retain jurisdiction over a removed action where claims by non-diverse plaintiffs have been improperly joined with claims by diverse plaintiffs.

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INTEREST OF AMICUS CURIAE

The Pharmaceutical Research and Manufacturers of America ("PhRMA") is a non-profit association that represents the country's leading pharmaceutical research and biotechnology companies.[1] PhRMA's member companies are the source of a majority of all new medicines that are discovered and marketed. In the last decade, PhRMA's members invested over $300 billion to develop new medicines. See PhRMA, *Pharmaceutical Industry Profile 2010*, at 44 (2010), *available at* http://www.phrma.org/sites/phrma.org/files/attachments/Profile_2010_FINAL.pdf. In 2009 alone PhRMA members invested an estimated total of $45.8 billion in discovering and developing new medicines, out of $65.3 billion industry-wide. *Id.* at inside front cover.

In recent years, PhRMA's members have faced an enormous and rapidly ballooning volume of product liability suits. In confronting these suits, PhRMA members, like many mass tort defendants, depend upon the efficiencies and procedural safeguards provided by the federal judicial system.

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[1] The parties have consented to the filing of this brief and their letters of consent have been lodged with the Clerk. In accordance with Supreme Court Rule 37.6, no counsel for a party authored this brief in whole or in part, no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief, and no person or entity other than PhRMA, its members, or its counsel made such a monetary contribution. A list of PhRMA members is available at www.phrma.org.

They rely in particular on the federal multidistrict litigation provisions and removal statutes, 28 U.S.C. §§ 1407, 1441, which, taken together, allow PhRMA members to aggregate an otherwise overwhelming caseload in federal court.

The Eighth Circuit's decision in this case drastically reduces the availability of removal in mass tort cases and thus limits the ability of PhRMA members to obtain consolidated treatment of such cases in multidistrict federal court proceedings. As a result, PhRMA members will be forced to defend in state court thousands of cases that properly belong in federal court, including duplicative suits like the state court filings in this matter. By adopting an unduly restrictive standard for finding fraudulent misjoinder that requires district courts to resolve difficult state-of-mind issues in order to determine their jurisdiction, the court of appeals' decision undermines federal diversity jurisdiction and frustrates the salutary goals underlying the multidistrict consolidation statute.

STATEMENT

1. The number of mass tort suits against pharmaceutical companies has increased dramatically in recent years, *see, e.g.*, Federal Judicial Center, *Manual for Complex Litigation* § 22.1, at 344 (4th ed. 2004), and now accounts for a substantial percentage of all product liability actions filed nationwide, *see, e.g.*, Administrative Office of the Courts, *Judicial Facts and Figures* tbl.4.4 note 4 (2009), *available at* http://www.uscourts.gov/uscourts/Statistics/JudicialFactsAndFigures/2008/Table404.pdf. Pharmaceutical mass tort cases also

represent a significant percentage of the cases consolidated for pretrial proceedings by the Judicial Panel on Multidistrict Litigation ("MDL Panel" or "Panel"). Over the last five years, the Panel has ordered at least 20 different multidistrict litigations involving pharmaceuticals. Judicial Panel on Multidistrict Litigation, "Products Liability Litigations," *available at* http://www.jpml.uscourts.gov/Docket_Information/docket_information.html.

Because of their size, scope, and monumental cost, pharmaceutical mass tort actions "strain the limits of the traditional adversary system," Advisory Committee on Civil Rules and Working Group on Mass Torts, *Report on Mass Tort Litigation* 4 (1999), *as reprinted without appendices in* 187 F.R.D. 293, 298 (1999), and "continue to plague the pharmaceutical industry," *see* Rochelle Chodock et al., *"Insuring" the Continued Solvency of Pharmaceutical Companies in the Face of Product Liability Class Actions*, 40 Tort Trial & Ins. Prac. L.J. 997, 997 (2005).

2. The huge volume of pharmaceutical and other mass tort actions and the resulting strain on judicial resources have created "enormous pressure to aggregate or combine [cases]." *Manual for Complex Litigation*, *supra*, § 22.1, at 346. The multidistrict litigation statute, 28 U.S.C. § 1407, has been a critically important tool in addressing the challenge of mass tort litigation that otherwise threatens to swamp the judicial system.[2] *See, e.g., In re "Agent*

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[2] This has been particularly true in recent years. From 1968, when the Panel was created, to September 30, 1995, a total of (continued...)

Orange" Prod. Liab. Litig., 304 F. Supp. 2d 404, 416 (E.D.N.Y. 2004) (Weinstein, J.) ("Mass tort actions are especially suited to MDL treatment."); 15 Charles Alan Wright et al., *Federal Practice and Procedure: Jurisdiction* § 3868, at 603 (3d ed. 2007) (MDLs have a "unique ability to deal effectively with the thorny problem of mass torts.").

In the pharmaceutical context in particular, multidistrict litigation has been an essential case management tool: The most prominent pharmaceutical mass torts – including those involving the Dalkon Shield (MDL No. 211), Benedictin (MDL No. 486), Fen-Phen (MDL No. 1203), Rezulin (MDL No. 1348), Propulsid (MDL No. 1355), Baycol (MDL No. 1431), Vioxx (MDL No. 1657), Bextra and Celebrex (MDL No. 1699), PPA (MDL No. 1407), and Hormone Replacement Therapies ("HRT") like Prempro (MDL No. 1507), the medication involved in the cases here – all have resulted in MDL treatment.

92,555 actions were consolidated for pretrial proceedings under § 1407. Administrative Office of the Courts, *Judicial Business of the United States Courts* tbl.S-22 (1997), *available at* http://www.uscourts.gov/uscourts/statistics/judicialbusiness/1997/tables/s22sep97.pdf. As of September 30, 2009, that number had reached 323,258. Administrative Office of the Courts, *Judicial Business of the United States Courts* tbl.S-20 (2009), *available at* http://www.uscourts.gov/Statistics/JudicialBusiness/JudicialBusiness.aspx?doc=/uscourts/Statistics/JudicialBusiness/2009/tables/S20Sep09.pdf. Thus, the average annual number of consolidated actions in the Panel's first 27 years was under 3,500. Over the next 14 years, that number had increased more than four times, to more than 16,400.

3. The MDL Panel is authorized to transfer only cases pending in federal district courts. *See* 28 U.S.C. § 1407(a). Consequently, the statutory right of defendants to remove cases from state to federal court under appropriate circumstances, *see* 28 U.S.C. § 1441(a), is an essential aspect of multidistrict litigation. When defendants are wrongfully deprived of their removal right, cases that would otherwise be transferred and consolidated under the auspices of a federal MDL are typically left unconsolidated and must remain in various state courts.

Manipulating the federal removal mechanism – and thus the MDL consolidation process – by joining unrelated parties in a single suit significantly exacerbates the problem of mass torts, leading to congestion of state court dockets, delay, and excess costs, and increasing the risk of inconsistent judicial rulings. *Compare Report on Mass Tort Litigation*, *supra*, at 28, *as reprinted in* 187 F.R.D. at 308 ("most fundamental" problem of mass torts is "sheer number of claims"), *with Manual for Complex Litigation*, *supra*, § 22.33, at 367 ("Centralization [under § 1407] serves judicial economy by avoiding duplication of discovery, preventing inconsistent or repetitive rulings, and conserving the financial resources of the parties, their counsel, and the judiciary.").

4. Lawyers bringing pharmaceutical mass tort claims seek to avoid federal court for a variety of reasons. "A basic pattern, familiar in general practice but more visible in mass torts, involves selection of a court that has proved beneficial to the party choosing the forum." *Report on Mass Tort Litigation*, *supra*, at 33, *as reprinted in* 187 F.R.D. at

310. *See also* Barbara J. Rothstein et al., *A Model Mass Tort: The PPA Experience*, 54 Drake L. Rev. 621, 623 (2006) (noting that "plaintiffs' counsel attempt to litigate in [state] jurisdictions with favorable discovery rules, early trial dates, and juries that are receptive to such claims"). In addition, plaintiffs often seek to file suit in a particular state in the hopes that a favorable rule of law will save their claims from dismissal. For example, Minnesota (where plaintiffs initially filed this case) is a favorite forum for plaintiffs because of its unusually long statute of limitations period. *See* Minn. Stat. § 541.05 (statute of limitations for product liability claims is six years); *Fleeger v. Wyeth*, 771 N.W.2d 524, 525 (Minn. 2009).

REASONS FOR GRANTING THE WRIT

I. The Lower Federal Courts Are in Disarray Over the Fraudulent Misjoinder Doctrine.

In *Tapscott v. MS Dealer Service Corp.*, 77 F.3d 1353 (11th Cir. 1996), the Eleventh Circuit became the first court of appeals to apply the fraudulent misjoinder doctrine. The district court in *Tapscott* severed two putative class actions joined in a single amended complaint, and remanded only the component that involved non-diverse parties. The Eleventh Circuit affirmed, holding that misjoinder of non-diverse plaintiffs under Federal Rule of Civil Procedure 20 "may be just as fraudulent as the joinder of a resident defendant against whom a plaintiff has no possibility of a cause of action," *id.* at 1360, as both have the effect of improperly preventing removal to federal court. Although this issue rarely reaches appellate courts, at least three

other circuits, including the court below, have indicated support for the fraudulent misjoinder doctrine. *See In re Benjamin Moore & Co.*, 318 F.3d 626, 630-31 (5th Cir. 2002) (recognizing "force of the *Tapscott* principle that fraudulent misjoinder of plaintiffs is no more permissible than fraudulent misjoinder of defendants to circumvent diversity jurisdiction"); *Calif. Dump Truck Owners Ass'n v. Cummins Engine Co.*, 24 Fed. Appx. 727, 729 (9th Cir. 2001) (assuming that Ninth Circuit would accept fraudulent misjoinder doctrine); Pet. at 12a-16a.

In the absence of appellate guidance, the district courts have taken a variety of approaches. Some courts have required a showing of "egregiousness" to justify dismissal of misjoined plaintiffs; others have applied the doctrine in all cases of misjoinder; and still others have rejected the doctrine completely. *See* Pet. at 10-11. Fraudulent misjoinder questions are appearing with increasing frequency, and the disarray in the lower courts merits attention. *See, e.g., Ayala-Castro v. GlaxoSmithKline (In re Avandia Mktg., Sales Practices & Prod. Liab. Litig.)*, 624 F. Supp. 2d 396, 412 n.46 (E.D. Pa. 2009) (surveying various approaches and noting that "[t]he Court of Appeals for the Third Circuit has not stated its view on whether and how district courts should recognize and treat the claimed egregious 'misjoinder' of plaintiffs to defeat diversity in the removal context."); *Hughes v. Sears, Roebuck & Co.*, No. 2:09-CV-93, 2009 WL 2877424, at *4 (N.D. W. Va. Sept. 3, 2009) ("Although some federal district courts faced with fraudulent misjoinder claims have required both a finding of misjoinder and a finding of a bad faith attempt to defeat diversity, others have rejected

an application of the 'egregious' standard when considering misjoinder in the context of remand petitions. . . . The Fourth Circuit has not addressed the issue." (internal citations omitted)); *Coastal Constr. Co. v. N. Am. Specialty Ins. Co.*, No. 10-206 DAE-BMK, 2010 WL 2816694, at *7 (D. Haw. July 14, 2010) ("District courts in the Ninth Circuit are split concerning the applicability of the exception and the circumstances in which the exception applies.").

II. Review By This Court Is Needed Because Fraudulent Misjoinder Cases Rarely Reach the United States Courts of Appeals.

Review by this Court is warranted because cases involving fraudulent misjoinder rarely reach the federal courts of appeals. Federal appellate review of cases involving fraudulent misjoinder is extremely rare for two reasons. First, a district court's decision to remand a case to state court is generally not appealable. 28 U.S.C. § 1447(d) ("An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise . . . ."). As a result, federal appellate courts typically cannot correct lower court decisions that either fail to recognize the doctrine of fraudulent misjoinder or that, while recognizing it, apply it improperly.[3]

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[3] Review of remand orders remains possible in civil rights cases, 28 U.S.C. §§ 1443, 1447(d), and in cases remanded for reasons other than lack of subject matter jurisdiction, *City & County of San Francisco v. PG & E Corp.*, 433 F.3d 1115, 1121 (9th Cir. 2006).

Second, a district court's refusal to remand a case to state court is not a final appealable order under 28 U.S.C. § 1291. *E.g., Neal v. Brown*, 980 F.2d 747, 748 (D.C. Cir. 1992) ("The decision to deny the remand clearly does not end the litigation, but merely determines that it will proceed in federal court. In holding that a denial of a motion to remand is not appealable under § 1291, we are in accord with every other federal court of appeals that has addressed this issue."). For this reason, even though review of an order denying remand can still occur, *see Tapscott*, 77 F.3d at 1356 & n.4 (exercising interlocutory jurisdiction under 28 U.S.C. § 1292(b)), it is exceptional.

Because guidance from the courts of appeals on the issue of fraudulent joinder is so scarce, and because it may take years for additional cases to make their way to the appellate courts, this Court should grant review to provide much-needed clarity on the vitality and applicability of the fraudulent misjoinder doctrine. *See* E. Farish Percy, *Defining the Contours of the Emerging Fraudulent Misjoinder Doctrine*, 29 Harv. J.L. & Pub. Pol'y 569, 575 (2006) (calling appellate review of fraudulent misjoinder doctrine "imperative").

III. The Proper Application of the Fraudulent Misjoinder Doctrine Is An Exceptionally Important Issue That Merits Review.

District courts in numerous federal circuits have recognized the fraudulent misjoinder doctrine as a vital tool in preventing plaintiffs from improperly depriving defendants of their statutory removal right. These courts have relied upon the doctrine in the pharmaceutical context, where this practice is

widespread. *See In re Prempro Prod. Liab. Litig.*, 417 F. Supp. 2d 1058, 1059-60 (E.D. Ark. 2006); *Ashworth v. Albers Med., Inc.*, 395 F. Supp. 2d 395, 409-13 (S.D. W. Va. 2005); *Greene v. Wyeth*, 344 F. Supp. 2d 674, 683-85 (D. Nev. 2004); *Jones v. Nastech Pharmaceutical*, 319 F. Supp. 2d 720, 728 (S.D. Miss. 2004); *In re Diet Drugs (Phentermine, Fenfluramine, Dexfenfluramine) Prods. Liab. Litig.*, 294 F. Supp. 2d 667, 677-79 (E.D. Pa. 2003); *In re Baycol Prods. Liab. Litig.*, MDL No. 1431, 2003 WL 22341303, at *3 (D. Minn. 2003); *In re Rezulin Prods. Liab. Litig.*, 168 F. Supp. 2d 136, 147-48 (S.D.N.Y. 2001).[4]

Two recent scholarly treatments of the fraudulent misjoinder doctrine have likewise concluded that the doctrine is essential to the proper application of the federal diversity jurisdiction and removal statutes. *See* Percy, *supra*, at 571, 575 (describing doctrine as "necessary to protect a diverse defendant's statutory right to remove" and "a vital tool for defendants who desire to litigate in federal court"); Laura J. Hines & Steven S. Gensler, *Driving Misjoinder: The Improper Party Problem in Removal Jurisdiction*, 57 Ala. L. Rev. 779, 780 (2006) (describing doctrine as "vital tool" of federal courts

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[4] For cases outside the pharmaceutical context, see, for example, *Palmero v. Letourneau Techs., Inc.*, 542 F. Supp. 2d 499, 524-25 (S.D. Miss. 2008); *Sutton v. Davol, Inc.*, 251 F.R.D. 500, 503-05 (E.D. Cal. 2008); *Asher v. Minn. Mining & Mfg. Co.*, No. 04CV522KKC, 2005 WL 1593941, at *7 (E.D. Ky. June 30, 2005); *Coleman v. Conseco, Inc.*, 238 F. Supp. 2d 804, 817-19 (S.D. Miss. 2002); and *Rudder v. Kmart Corp.*, No. 97-0272-BH-S, 1997 WL 907916, at *5 (S.D. Ala. Oct. 15, 1997).

for "polic[ing] joinder gamesmanship"). Indeed, even commentary skeptical of the doctrine makes a compelling case that it is an area is in desperate need of review. *See* Ronald A. Parsons, Jr., *Should the Eighth Circuit Recognize Procedural Misjoinder?*, 53 S.D. L. Rev. 52, 66 (2008) ("Unpredictability and confusion appear to be precisely what the *Tapscott* decision has produced in its wake. . . . [M]any courts have 'foundered on the shoals of tautology' in trying to discern and define when misjoinder should be considered as having slipped from mere misjoinder into the surly realm of egregiousness.").

The scope of the fraudulent misjoinder doctrine has significant and far-reaching consequences. Requiring a showing of "egregiousness" – and, in particular, requiring an inquiry into the subjective intent of the plaintiff – exacerbates the problem of forum shopping in pharmaceutical mass tort actions and encourages plaintiffs' lawyers to misjoin unrelated parties in order to defeat diversity jurisdiction.

Numerous courts have held that where, as here, the only common "transaction or occurrence" among plaintiffs is that they have ingested the same type of medicine, joinder is improper.[5] Failing to recognize

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[5] *See In re Prempro*, 417 F. Supp. 2d at 1060 (finding misjoinder where the "only common thing" among plaintiffs is that they took a hormone replacement therapy); *In re Diet Drugs*, 294 F. Supp. 2d at 679 (finding misjoinder "where the only connection among plaintiffs is their use of certain pharmaceuticals"); *In re Baycol*, 2003 WL 22341303, at *4 (finding misjoinder where plaintiffs alleged "injuries suffered as a result of ingesting Baycol, without more"); *In re Rezulin* (continued...)

the doctrine of fraudulent misjoinder, or limiting it to cases of "egregiousness" or subjective bad faith, opens the door to allowing pharmaceutical mass tort plaintiffs to misjoin parties in what the *Tapscott* court called "wholly distinct" cases, 77 F.3d at 1360, expecting that district courts, including MDL courts, will be required to remand their cases to state court.

In addition to encouraging "joinder gamesmanship," a doctrine that allows easy avoidance of federal court jurisdiction will undercut the benefits of multidistrict consolidation. The MDL process, which has become so critical in recent years to handling the problem of mass torts, relies upon the proper administration of the removal process because § 1407 transfers are authorized only from federal court. *See* 28 U.S.C. § 1407(a). If district courts lack authority to sever fraudulently misjoined

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Prods. Liab. Litig., MDL No. 1348, 2002 WL 548750, at *2 (S.D.N.Y. Apr. 12, 2002) ("[J]oinder of plaintiffs who have no connection to each other aside from the fact that they ingested Rezulin is misjoinder."); *Simmons v. Wyeth Labs., Inc.*, No. 96-CV-6631, 1996 WL 617492, at *1, 4 (E.D. Pa. Oct. 24, 1996) (finding misjoinder where plaintiffs alleged that they "experienced one or more of numerous injuries and side effects" from using contraceptive Norplant); *In re Orthopedic Bone Screw Prods. Liab. Litig.*, MDL No. 1014, 1995 WL 428683, at *6 (E.D. Pa. July 17, 1995) (joinder based on claimants having "the same or similar device of a defendant manufacturer implanted in or about their spine" is improper); *see also Purdue Pharma, L.P. v. Estate of Heffner*, 904 So. 2d 100, 103 (Miss. 2004) ("The mere taking of the *same* prescription drug does not supply plaintiffs with the *same* transaction or occurrence, or *same* series of transactions or occurrences, as required by [Mississippi] Rule 20.").

parties and exercise federal diversity jurisdiction over the remaining cases, § 1407's effectiveness will be significantly hampered.

The enactment by Congress of the Class Action Fairness Act ("CAFA") of 2005, Pub. L. No. 109-2, 119 Stat. 4 (codified in scattered sections of 28 U.S.C.), further magnifies the importance of the fraudulent misjoinder doctrine. Designed to stem the "parade of abuses" committed by plaintiffs' lawyers and to keep interstate class actions out of state court, S. Rep. No. 109-14, at 6 (2005), *as reprinted in* 2005 U.S.C.C.A.N. 3, 7, the Act dramatically expands federal jurisdiction over interstate class actions by relaxing the complete diversity requirement for such actions, *see* 28 U.S.C. § 1332(d), and by strengthening the related removal provisions, *see id.* § 1453.[6]

CAFA evidences a strong public policy in favor of resolving complex mass-party litigation in federal court. *E.g.*, *Evans v. Walter Indus., Inc.*, 449 F.3d 1159, 1164 (11th Cir. 2006) ("The language and structure of CAFA itself indicate[] that Congress contemplated broad federal court jurisdiction . . . ."); S. Rep. No. 109-14, at 4, *as reprinted in* 2005

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[6] CAFA also applies to "mass actions," defined in the statute (with certain exceptions) as "any civil action . . . in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact." 28 U.S.C. § 1332(d)(11)(B)(i), *see also id.* § 1332(d)(11)(A) ("[A] mass action shall be deemed to be a class action removable under paragraphs (2) through (10) if it otherwise meets the provisions of those paragraphs.").

U.S.C.C.A.N. at 5 ("key reason" for problems with class action system "is that most class actions are currently adjudicated in state courts"). The enactment of CAFA reflects the extent to which plaintiffs' counsel have been successful – primarily through forum shopping and joinder gamesmanship – in keeping interstate class actions out of federal court. *See* S. Rep. No. 109-14, at 10, *as reprinted in* 2005 U.S.C.C.A.N. at 11 ("In interstate class actions, plaintiffs' counsel frequently and purposely evade federal jurisdiction by adding named plaintiffs or defendants simply based on their state of citizenship in order to defeat complete diversity."); *id.* at 13-14, *as reprinted in* 2005 U.S.C.C.A.N. at 14 (noting that many class actions are brought in "improbable jurisdictions" and finding that one reason for the "dramatic explosion of class actions in state courts is that some state court judges are less careful than their federal court counterparts about applying the procedural requirements that govern class actions").

The fraudulent misjoinder doctrine serves goals similar to CAFA's: combating this gamesmanship and allowing complex mass tort litigation to proceed in federal court. Indeed, CAFA applies to certain non-class action suits – so-called "mass actions." *See supra* note 6. Because a "mass action" is defined in the Act as involving 100 or more plaintiffs, *see id.*, counsel can easily avoid CAFA's reach by doing what Respondents in this case have done: strategically joining fewer than 99 additional plaintiffs. *See* Hines & Gensler, *supra*, at 809 ("In order to escape [CAFA's] liberalized jurisdiction and removal provisions, one suspects that plaintiffs will file ever more joined-but-not-mass actions. And having taken

that step to avoid class action and mass action removal under CAFA, it seems likely that many such plaintiffs will also join spoiler parties to defeat ordinary diversity removal."); *see also* Carol Rice Andrews, *The Personal Jurisdiction Problem Overlooked in the National Debate About "Class Action Fairness,"* 58 SMU L. Rev. 1313, 1384 (2005) ("CAFA motivates counsel to otherwise avoid federal subject-matter jurisdiction by joining a large number of multi-state plaintiffs under traditional party joinder rather than the class action device . . . .").

Of course, joining together 100 or more plaintiffs does not guarantee treatment under CAFA. But it would be incongruous if removal of a mass pharmaceutical personal injury action could be defeated by the same species of forum manipulation that animated the adoption of CAFA, simply because it involved fewer than 100 plaintiffs. Consequently, a strong fraudulent misjoinder doctrine is an essential complement to CAFA in carrying out Congress's stated goal of preventing procedural chicanery depriving defendants of their proper removal rights.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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